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Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

No. 01-658

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD McGUIRE,
Petitioner,

versus

LOWE'S HOME CENTERS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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8 pp

TABLE OF AUTHORITIES

Cases:	PAGE
Birgel v. *Board of Commissioners of Butler County*, 125 F.3d 948 (6th. Cir., 1998), cert. denied, 522 U.S. 1109, 118 S.Ct. 138, 140 L.Ed.2d. 104 (1998)	2
Bray v. *Mariott Hotels*, 110 F.3d 986 (3d. Cir., 1997)	4
Burns v. *AAF-McQuay*, Inc., 96 F.3d 728 (4th. Cir., 1996)	4
Erebia v. *Chrysler Plastic Products Corporation*, 772 F.2d 1256 (6th. Cir., 1985)	4
Kolstad v. *American Dental Ass.*, 108 F.3d. 1431 (D.C. Cir., 1998)	4
Manzer v. *Diamond Shamrock Chemical Co.*, 29 F.3d 1070 (6th Cir., 1994)	4
McDonnell Douglass Corp. v. *Green*, 411 U.S. 972, 93 S.Ct. 1817 (1973)	3
Reeves v. *Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000)	3, 4
Robinson v. *Runyon*, 149 F.3d. 507 (6th. Cir., 1998)	4
Stephens v. *Kerrigan*, 122 F.3d. 171 (3d. Cir., 1997)	4
Talley v. *Bravo Pitino, Ltd.*, 61 F.3d. 1241 (6th Cir., 1995)	4
Taylor v. *McKeithen*, 407 U.S. 191, 92 S.Ct. 1980 (1972)	2
Thomas v. *Runyon*, 108 F.3d. 956 (8th Cir., 1997)	5–6
Trans-World Airlines v. *Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985)	3

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This is the Reply Brief of the Petitioner,

Harold McGuire. It is true, as Respondent pointed, out, that Petitioner indicated that it was the manner in which the Court of Appeals reached its decision, as opposed to the result of the decision, that forms the basis of his Petition.

Obviously, the Petitioner did not mean to imply, nor does he believe that he implied, that the result in this case was just or correct!

Petitioner's point was simply that this Court would be more likely to favor this Petition based upon the "acceptable appellate opinion" issue than because of the obvious error of the Courts below, as this Court is certainly not an "error correcting" Court.

Petitioner concedes that there are no statutes or rules of Court setting forth the requirements for federal appellate opinions. Certainly, some states do have rules of practice or statutes that set minimum standards for appellate opinions.

This Court, of course, did not make the Federal Rules of Civil or Appellate Procedure; Congress did. This Court, therefore, may only speak to the issue of standards for appellate opinions through an opinion in an actual case or controversy, such as the one at bar. An opinion in this case would certainly have the effect of creating the standards that Petitioner is seeking, and perhaps in the process improving the quality of the administration of civil justice in the Courts of the nation.

Respondent has pointed out that this Court did speak to the issue at bar to a certain extent in *Taylor* v. *McKeithen*, 407 U.S. 191, 194, 92 S.Ct. 1980, 1982 (1972) [Brief in Opposition, p. 6].

In that case, this Court indicated that Courts of Appeal should have wide latitude in deciding the content of their opinions, or even whether or not to write an opinion at all.

Petitioner does not believe that this Court meant for its *Taylor* opinion to be taken as a license for the Courts of Appeal to summarily affirm poorly analyzed and erroneous decisions of the District Courts. That is what has happened in this case, even though it is one in which the Petitioner was entitled to de novo review by the Court of Appeals, *Birgel* v. *Board of Commissioners of Butler County*, 125 F.3d 948 (6th Cir., 1998), *cert. denied*, 522 U.S. 1109, 118 S.Ct. 138, 140 L.Ed.2d 104 (1998).

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As Respondent pointed out, the District Court held that Petitioner's case failed for lack of proof of: 1) the fourth prong of a "prima facie" *McDonnell-Douglass* case (lack of comparators); and 2) a failure to prove pretext.

As Petitioner has repeatedly emphasized, the entire *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 972, 93 S.Ct. 1817 (1973) analysis is irrelevant in a case such as this, in which Petitioner has produced *direct* evidence of illegal animus upon the part of employer, *Trans-World Airlines* v. *Thurston*, 469 U.S. 111, 122, 105 S.Ct. 613, 621-622, 83 L.Ed.2d.523 (1985).

The entire point of Petitioner's appeal was that the District Court had improperly characterized his direct evidence as "stray remarks" and "ambiguous statements," and otherwise improperly discounted his proof of discrimination.

This case bears a striking resemblance to that of *Reeves* v. *Sanderson Plumbing Products, Inc.*, 120 S.Ct.2097 (2000). In that case, the lower Courts had categorized as "stray remarks" two arguably age biased remarks by a plaintiff's supervisor because the remarks were not made within the direct context of an adverse employment decision.

This Court, of course, held that such a categorization was in error, and that the remarks at issue did, indeed, create an inference of impermissible bias.

In the case at bar, Andy Heath made one age-biased remark during a discussion of the Petitioner's promotability, and the equivalent of another such remark (the "Senior Citizen Port-a-Potty" gift) within several months of the other ("fat old man") remark. He also regularly criticized certain older workers for their "old way of doing things," "inflexibility," and "resistance to change."

Petitioner had more and better evidence of age bias than the plaintiff in *Reeves* v. *Sanderson, Id.* His evidence was also more direct. He did not need to show pretext.

He showed it anyhow. It was as follows:

1. Respondent's failure to follow its own policies, to Petitioner's detriment, in investigating the sexual harassment allegations against him, *Robinson* v. *Runyon*, 149 F.3d.507, 513-514 (6th Cir., 1998), *Kolstad* v. *American Dental Ass.*, 108 F.3d 1431, 1436 (D.C. Cir., 1998).

2. Petitioner's denial of the more serious sexual harassment allegations against him, thereby throwing into question the truth of the Respondent's basis for demoting him, *Stephens* v. *Kerrigan*, 122 F.3d. 171, 182 (3d. Cir., 1997), *Manzer* v. *Diamond Shamrock Chemical Co.*, 29 F.3d. 1070, 1083-1084 (6th Cir., 1994)

3. The unusually powerful evidence of discriminatory animus in the case, apart from the "pretext analysis" (i.e. in the Petitioner's "first phase" prima facie case), *Bray* v. *Marriott Hotels*, 110 F.3d.986, 991 (3d Cir., 1997), *Burns* v. *AAF-McQuay, Inc.*, 96 F.3d.728, 733 (4th Cir., 1996).

Petitioner also did not need to show "comparators," i.e. more harshly treated younger employees who were similarly situated to him. There is no such requirement, either as the fourth prong of a *McDonnell-Douglass* prima facie case, or as proof of pretext, *Erebia* v. *Chrysler Plastic Products Corporation*, 772 F.2d.1256, 1257 (6th Cir., 1985), *Talley* v. *Bravo Pitino Restaurant, Ltd.*, 61 F.3d. 1241 (6th Cir., 1995).

All a plaintiff ever need prove under any variation of McDonnell-Douglass as his prima facie (first phase) case is: 1) an adverse action; 2) membership in a protected category, and 3) some evidence that gives rise to an inference of illegal bias in a challenged employment decision, *Tho-*

mas v. *Runyon*, 108 F.3d. 956, 958 (8th Cir., 1997). Obviously, the Petitioner proved this and more.

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Respondent asserts that Petitioner's discussion of cases involving one biased remark is misleading. According to Respondent, the reason that such remarks were not isolated or "stray" in the cases at issue is because they were, ". . . combined with other less equivocal evidence of discrimination," (Brief in Opposition, pp. 10-11).

Petitioner acknowledges this point.

However, his proof is quite similar to that in the case cited in his original Brief at pages 10-11 and at pages 11-12 of the Brief in Opposition. It did not consist merely of the "fat old man" remark. It did not consist merely of the senior citizen "port-a-potty" Christmas gift. It did not consist merely of the repeated references to Petitioner's older subordinates as "inflexible," as "resistant to change," as wedded to an, ". . . older way of doing things." It consisted of *all* of this evidence, as well as other more circumstantial evidence (including, but not limited to, the statistical evidence).

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Of course, there is one significant difference in the opinion of the Court of Appeals in this case and the opinions of the Courts of Appeal in every other case cited in all of the Briefs of the parties in this case. It is that each of the opinions that the parties have cited to this Court contained a fully developed analysis of the facts and law of the case. The opinion in this case contained no analysis whatsoever. It is that difference that justifies the granting of this Petition.

Respectfully Submitted,

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